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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

REBUILD AMERICA, INC., a Florida corporation, Plaintiff/Appellee, v. THE GOLDEN RAVEN, INC., a Nevada corporation, Defendant/Apellant.	2 CA-CV 2009-0142 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20036513

Honorable Paul E. Tang, Judge

AFFIRMED

Carson Messinger Elliott Laughlin & Ragan, PLLC
By Mark L. Manoil
Phoenix
Attorneys for Plaintiff/Appellee

Law Offices of Joseph H. Watson
By Joseph H. Watson
Tucson
Attorneys for Defendant/Appellant

K E L L Y, Judge.

¶1 In this appeal arising from a quiet title action, defendant/appellant Golden Raven, Inc. maintains the trial court erred in denying its motion for new trial, following the trial court's grant of partial summary judgment in favor of plaintiff/appellee, Rebuild America, Inc. In the motion, Golden Raven asserted Rebuild America had not been entitled to summary judgment because it had not registered to do business in Arizona and, therefore, had lacked the capacity to bring the quiet title action. Finding this contention barred by the doctrine of res judicata, we affirm.

Background

¶2 On August 21, 2002, the Maricopa County Superior Court granted ESI 97 judgment in an action to foreclose the right to redeem tax liens it held on certain property in Pima County at issue in this case.[1] The court ruled ESI 97 was the owner in fee simple of the property and ordered the county treasurer to execute a deed to that effect. The Pima County Treasurer issued the deed on October 8, 2002, and it was recorded January 9, 2003. ESI 97 subsequently quitclaimed its interest in the property to Advantage 99TD Trust ("Advantage 99"), Rebuild America's predecessor in interest.

¶3 On August 21, the same day judgment had been entered in favor of ESI 97, Golden Raven's statutory agent, Homer Koliba, recorded a deed purporting to quitclaim the interest of Brian Sanford, the record owner of the properties against whom ESI 97 had foreclosed, to Golden Raven. And, in January 2003, Golden Raven recorded a deed of trust purporting to grant a lien in favor of Ken Jacobson. Advantage 99 thereafter

[1]The liens were purchased by Southtrust Estates and Trust Co., Inc./Transam. ESI 97 was a fictitious name Transam registered with the Florida Secretary of State.

brought the instant action against Golden Raven and Jacobson alleging they had created a cloud on its title to the properties and "interfere[d] with [its] ability to sell."

¶4 Golden Raven did not answer the complaint and a default was entered against it. Although Rodney Ledbetter, one-time president of Golden Raven, initially objected to Advantage 99's service on Golden Raven, it ultimately answered and the entry of default was set aside. Both Advantage 99 and Golden Raven moved for summary judgment. Thereafter, Advantage 99 transferred its interest in the properties to Rebuild America, which was substituted as the plaintiff in the action. After a hearing, the trial court entered partial summary judgment in favor of Rebuild America.

¶5 Golden Raven subsequently moved again for summary judgment and for a new trial, arguing Rebuild America lacked capacity to sue in Arizona, because it had not registered to do business in the state, as required by statute. *See* A.R.S. § 10-1502(A) ("A foreign corporation transacting business in this state without a grant of authority shall not be permitted to maintain a proceeding in any court in this state until it is authorized to transact business.").[2] The trial court denied its motions, finding that Rebuild America was exempt from registration under § 10-1501(B) and that res judicata barred its defense that Rebuild America lacked the capacity to file suit. This appeal followed.

[2]Golden Raven also moved to dismiss the case, raising essentially the same issue raised in the subsequent motions. The record does not show that the trial court ruled on that motion specifically, but it rejected the same arguments in denying Golden Raven's other motions. And in any event, Golden Raven does not challenge the trial court's failure to rule on the motion.

Discussion

¶6 Golden Raven argues the trial court "erred in declaring [Rebuild America] and its predecessors exempt from registration and compliance under" A.R.S. § 10-1501(B) and maintains article 14, §§ 5 and 8 of the Arizona Constitution also require Rebuild America to register. Because Golden Raven appeals from the trial court's denial of its motion for new trial, we review only the issues it raised in that motion.[3] *See Matcha v. Winn*, 131 Ariz. 115, 116, 638 P.2d 1361, 1362 (App. 1981). And, we will not reverse the trial court's decision absent a clear abuse of discretion. *State Farm Fire & Cas. Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995). A trial court abuses its discretion when it makes an error of law in reaching its decision. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 10, 63 P.3d 282, 285 (2003).

¶7 First, however, we address whether res judicata, also known as claim preclusion, applies. Rebuild America argues, and the trial court ruled, that Golden Raven's argument regarding capacity to sue is barred by res judicata. According to Rebuild America, the question of its predecessor's capacity to sue could have been raised in the tax lien foreclosure action and is therefore precluded. The application of claim

[3]Golden Raven also included the trial court's denial of its second motion for summary judgment in its notice of appeal. But that motion was filed after judgment had been entered in favor of Rebuild America and could only have been granted had Golden Raven first successfully gained relief under Rule 59, Ariz. R. Civ. P. In any event, as the trial court noted, the two motions raised essentially the same argument. Indeed, the motion for new trial incorporated by reference the arguments made in the motion for summary judgment.

preclusion or res judicata is an issue of law that we review de novo. *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, ¶ 10, 53 P.3d 1139, 1142 (App. 2002).

¶8 Under the doctrine of claim preclusion, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). Likewise, a "defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." Restatement (Second) of Judgments § 18 (1982); *see also Pettit v. Pettit*, 218 Ariz. 529, ¶¶ 4, 10, 189 P.3d 1102, 1104, 1106 (App. 2008).

¶9 Golden Raven maintains, however, that claim preclusion should not apply here, but rather issue preclusion, also known as collateral estoppel.[4] It argues it should be allowed to raise the issue of capacity to sue in this action, because the issue was not actually litigated in the default judgment entered in the foreclosure action, and an issue must be actually litigated in a prior proceeding for issue preclusion to apply. *See Chaney Bldg. Co.*, 148 Ariz. at 573, 716 P.2d at 30 ("[I]ssue preclusion is applicable when the issue . . . to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it . . . ."). But whether issue preclusion might apply in this context is immaterial to a determination of whether claim preclusion applies to bar Golden Raven's argument. *Cf. 4501 Northpoint LP v. Maricopa County*,

[4]We note that both parties conflate the doctrines of issue preclusion and claim preclusion in their briefs on appeal.

212 Ariz. 98, ¶ 26, 128 P.3d 215, 219-20 (2006) (explaining that issue preclusion requires issues be actually litigated while claim preclusion requires only judgment on the merits).

¶10 We must determine if there was a judgment "on the merits" between the same parties or their privies, and if this action asserts "the same cause of action" as the foreclosure action. *See Chaney Bldg. Co.*, 148 Ariz. at 573, 716 P.2d at 30; *see also 4501 Northpoint*, 212 Ariz. 98, ¶ 26, 128 P.3d at 219-20. In the context of claim preclusion, a "judgment on the merits" includes a default judgment. *See Norriega v. Machado*, 179 Ariz. 348, 353, 878 P.2d 1386, 1391 (App. 1994) ("A default judgment has the same *res judicata* effect as a judgment on the merits where the issues were litigated."); Restatement (Second) of Judgments § 18, cmt. a ("It is immaterial whether the judgment was rendered upon a verdict or upon a motion to dismiss or other objection to the pleadings or upon consent, confession, or default.").

¶11 We turn then to whether the actions were between the same parties or their privies. Golden Raven asserts in its reply brief, without citation to authority or the record, that the deed quitclaiming Sanford's interest in its favor "predates this action and the tax foreclosure case." *See* Ariz. R. Civ. App. P. 13(a)(6). Although Golden Raven does not develop the argument, another department of this court has stated that the above-stated rule binding successors in interest "has no application to a successor who acquired [an] interest before the action was commenced concerning the property." *Clugston v. Moore*, 134 Ariz. 205, 207, 655 P.2d 29, 31 (App. 1982).

¶12 We disagree with Golden Raven, however, that it took its interest in the property before the tax foreclosure action was instituted. ESI 97 filed the foreclosure

action in January 2002. The record contains a deed signed by Sanford on November 29, 2000, quitclaiming his interest in the property to Golden Raven. That deed, however, was not recorded until August 21, 2002, and Sanford testified in his deposition that he had "held on to it" until that date. In the absence of any evidence the deed was delivered, we cannot say it was effective on the date signed. A.R.S. § 33-401(A). And, Sanford recorded a different deed which granted him ownership of the property on December 20, 2000, suggesting he had no intent to transfer the property to Golden Raven on November 29, 2000. *See Robinson v. Herring*, 75 Ariz. 166, 170, 253 P.2d 347, 349-50 (1953) (intent to pass title essential fact).

¶13 Additionally, Golden Raven itself apparently became a party to the foreclosure action as it filed an appeal to this court in that matter. Thus, it would be directly subject to the res judicata effect of the foreclosure action on that basis, not simply as a successor in interest to Sanford. Thus we conclude the two actions here were between the same parties or their privies.

¶14 To determine whether a second suit asserts the same cause of action for purposes of claim preclusion, Arizona applies the same evidence test. *Phoenix Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997). Under that test, "[i]f no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Id.* Here, the evidence needed in the quiet title action was the same as had been required in the foreclosure action—evidence showing Rebuild America and its predecessors were entitled to the property. Thus, there was a judgment on the merits between the same parties or their privies, on the

same cause of action. *See Secrist v. State*, 2 Ariz. App. 240, 242, 407 P.2d 781, 783 (1965) ("[O]rder denying the State's motion to set aside judgment foreclosing the right of redemption is res adjudicata as to the State of Arizona."); *Lewis v. Palmer*, 67 Ariz. 189, 195-96, 193 P.2d 456, 460 (1948) ("The judgment in [tax foreclosure proceeding] . . . having become final, it is final for all purposes and the attempted present collateral attack can not be entertained. This is the application of the doctrine of res judicata . . . .").

¶15 Claim preclusion therefore applies and bars Golden Raven from now raising the issue of capacity. Rebuild America's predecessors' purported lack of capacity, based on the argument that they had been doing business in this state while unregistered, could have been raised as a defense in the foreclosure action. To have asserted the defense in that action, Golden Raven or its predecessor would have argued, exactly as Golden Raven does now, that buying tax liens and foreclosing upon them constitutes doing business in this state and is not exempt under § 10-1501(B). Having failed to bring this defense in that action, Golden Raven cannot do so now. *See Pettit*, 218 Ariz. 529, ¶¶ 4, 10, 189 P.3d at 1104, 1106. Thus the trial court properly denied Golden Raven's motions.

Disposition

¶16 The judgment of the trial court is affirmed. Rebuild America has requested attorney fees based on its compliance with A.R.S. § 12-1103(B) and pursuant to A.R.S. § 12-349. Under § 12-349(A) and (F), an appeal is "without substantial justification" if it "constitutes harassment, is groundless and is not made in good faith." In this case, Golden Raven's arguments on appeal were entirely without merit, and therefore

groundless. Likewise, the appeal demonstrates on its face that it could not have been taken in good faith. *See Ziegelbauer v. Ziegelbauer*, 189 Ariz. 313, 318, 942 P.2d 472, 477 (App. 1997) ("[T]he appeal could not be said to have been taken in good faith given the maintenance of [appellant's] position in light of the governing law."); *cf. Boone v. Superior Court*, 145 Ariz. 235, 240, 700 P.2d 1335, 1340 (1985) (claim is in bad faith under Rule 11, Ariz. R. Civ. P., only when there is "clear evidence" that claim is not colorable).

¶17 Counsel entirely failed to address res judicata, an alternate ground of the trial court's ruling against Golden Raven, in the opening brief. *See In re Marriage of Pownall*, 197 Ariz. 577, n.5, 5 P.3d 911, 917 n.5 (App. 2000) ("Arguments raised for the first time in a reply brief are deemed waived."). Indeed, given that Golden Raven mentioned the issue of res judicata only in response to Rebuild America's argument on that basis in its answering brief, it is uncertain whether Golden Raven would have informed this court of the trial court's alternate ground for its decision had Rebuild America not asserted it.

¶18 Additionally, given the record before us, we can only conclude the appeal constituted harassment. Although we disposed of the matter on res judicata grounds, making it unnecessary to address other problems with the appeal, we note that the issue of capacity was waived below because counsel raised it only after the trial court had pronounced judgment at the summary judgment hearing, despite the fact that another party had raised it earlier in the proceedings. *Cf. Medlin v. Medlin*, 194 Ariz. 306, 981 P.2d 1087 (App. 1999) ("An issue raised for the first time after trial is deemed to have

been waived."). And, even had the claim not been precluded and waived, it was without merit. *See* § 10-1501(B)(5), (8), (9). Thus, because the appeal was brought without substantial justification we grant Rebuild America's request for attorney fees under § 12-349(A)(1), upon compliance with Rule 20, Ariz. R. Civ. App. P. Golden Raven and its counsel Joseph Watson shall be liable for the fees. *See* § 12-349(B). We therefore need not address whether Rebuild America was entitled to fees under § 12-1103(B).[5]

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

[5]In its verified complaint, Rebuild America's predecessor asserted it had complied with the requirements of § 12-1103(B). Rebuild America also included copies of documents showing its compliance in its appendix on appeal, but the documents do not appear in the record below. *See* Ariz. R. Civ. App. P. 11(a)(1), (4).